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No. 91-1502

FILED
MAR 25 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, ET AL.,
APPELLANTS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

MICHAEL JAY SINGER
MARK B. STERN
LORI M. BERANEK
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

The three-judge district court held that the Census Clause of the Constitution (Art. I, § 2, Cl. 3) and the Census Act (13 U.S.C. 141) permit the Secretary of Commerce to include federal personnel stationed abroad (and their dependents) in the state population totals on which the apportionment of Representatives is based. However, the court held that the Secretary's manner of doing so following the 1990 census was arbitrary and capricious, in violation of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), because he did not furnish an adequate justification. The questions presented are:

1. Whether judicial review of the apportionment of Representatives, based on the census including federal personnel stationed abroad, is barred by virtue of the political question doctrine, the APA's exceptions for situations in which "statutes preclude judicial review" and "agency action is committed to agency discretion by law," 5 U.S.C. 701(a), and the inapplicability of the APA to the President.

2. Whether, if judicial review is not barred, the inclusion of federal personnel stationed abroad was arbitrary and capricious.

3. Whether, if the district court correctly found that the Secretary's determination violated the APA, it properly ordered appellants to effect a new apportionment of Representatives with the personnel abroad thrown out of the underlying census count, rather than remanding the matter to the Secretary for further proceedings.

PARTIES TO THE PROCEEDINGS

The appellants herein, who were defendants in the district court, are Barbara Franklin, Secretary of Commerce (substituted as a party pursuant to Rule 35.3 of this Court); Mark W. Plant, Acting Under Secretary of Commerce for Economic Affairs (also substituted pursuant to Rule 35.3); the Bureau of the Census; Barbara Bryant, Director of the Bureau of the Census; and George Herbert Walker Bush, the President of the United States. Donnald K. Anderson, the Clerk of the United States House of Representatives, also was a defendant in the district court.

The appellees in this Court, who were the plaintiffs below, are the Commonwealth of Massachusetts and two of its registered voters, Edward F. Berlin and Karen J. Kepler.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the three-judge district court (App. 1a-84a) and its order denying reconsideration and a stay (App. 85a-93a) are not yet reported.

JURISDICTION

The judgment of the three-judge district court (App. 94a-96a) was entered on February 20, 1992, and the notice of appeal (App. 97a-98a) was filed on March 16, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1253. See note 7.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2, Clause 3 and Section 8, Clause 18 of the United States Constitution; Sections 2 and 5 of the Fourteenth Amendment; 2 U.S.C. 2a; and 13 U.S.C. 141(a) and (b), are reproduced at App. 99a-103a.

STATEMENT

The Commonwealth of Massachusetts and two of its registered voters brought this suit to challenge, *inter alia*, the decision by the Secretary of Commerce to include in the 1990 census count for each State those federal personnel stationed abroad who designated that State as their permanent "home of record" when they entered the Armed Forces, or who were found to have a sufficient nexus to that State under an alternative standard. The court rejected appellees' contentions that inclusion of federal personnel abroad (and their dependents) in the enumeration on which the apportionment of Representatives is based violates the Census Clause of the Constitution (Art. I, § 2, Cl. 3) and the Census Act (13 U.S.C. 141(b)). However, concluding that the conduct of the census is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, the court held that the *manner* of including personnel abroad was arbitrary and capricious, because, in its view, the Secretary of Commerce did not furnish an adequate explanation or factual justification for the method of allocation. Rather than remanding the matter to the Secretary, however, the court ordered appellants to effect a new apportionment of the House of Representatives, with the personnel abroad *excluded*. Under the district court's order, a total of 922,819 people must be eliminated from the apportionment counts. Stipulation of Facts (Stip.) ¶ 53.

1. Article I, Section 2, Clause 3 of the Constitution provides that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers." It further provides that "[t]he actual Enumeration shall be made * * * in such Manner as they [the Congress] shall by Law direct." Pursuant to the latter provision, Congress enacted the current Census Act, which directs the Secretary of Commerce to conduct a census, as of April 1 of every tenth year, "in such form and content as [the Secretary] may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). The Census Act further provides that "[t]he tabulation of total population by States * * * as required for apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." 13 U.S.C. 141(b).

Under the apportionment statute, the President then must transmit to Congress, during the first week of its next Session, "a statement showing the whole number of persons in each State," as ascertained under the decennial census, "and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions." 2 U.S.C. 2a(a). The apportionment statute further provides that "[e]ach State shall be entitled * * * to the number of Representatives shown in the [President's] statement." 2 U.S.C. 2a(b). Within 15 calendar days after receipt of the President's statement, the Clerk of the House of Representatives must send to the Governor of each State a certificate of the number of Representatives to which it is entitled under these provisions. *Ibid.*

Following the 1990 census, the Census Bureau tabulated the population by States. The Secretary of Commerce transmitted those results to the President on December 26, 1990, as required by 13 U.S.C. 141(b), along with a calculation of the number of Representatives to which each State is entitled under the method of equal proportions. The President transmitted his statement to Congress on January 3, 1991, and the Clerk of the House of Representatives sent certificates of entitlement to the States based on the President's statement on January 16, 1991. The Clerk certified that the Commonwealth of Massachusetts is entitled to ten Representatives, a loss of one from the 1980 apportionment. App. 2a n.1.

2. Military personnel serving outside the States were first included in the Nation's total population in 1830

and 1840, although their numbers were not allocated to particular States for purposes of apportionment of Representatives. The counting was then discontinued, but was reinstituted in 1900 and continued through the 1960 census. Stip. ¶ 18.

In the 1970 census, the Department of Commerce decided to include overseas military personnel in state population totals for apportionment purposes, using "home of record" data. *Borough of Bethel Park* v. *Stans*, 449 F.2d 575, 581 (3d Cir. 1971). A person designates a "home of record" when enlisting in one of the military services (see DD Form 1966, Box 5); it "reflects the State to which he or she will be moved upon separation."[1] Instructions for completing the enlistment form state that the "home of record" is the address "declared by you to be your permanent home or actual home at time of enlistment," and not a "temporary address." Mot. for Reconsideration, Exh. 3.

The Commerce Department decided to include overseas military personnel in state totals in 1970 because of the large number serving abroad during the Vietnam conflict and strong bipartisan congressional support for doing so.[2] The Commerce Department also relied on a 1969 opinion by then-Assistant Attorney General Rehnquist, who concluded that "the Director of the Census may, in his discretion, validly adopt that procedure." A.R. 15. Assistant Attorney General Rehnquist stated his understanding that the factors that had led to the Director's former practice (difficulties in securing reliable informa-

[1] Congressional Research Service, *The 1990 Census: Including Foreign-Based Military and Civilian Personnel in the State Counts* 4 (June 20, 1990) [hereinafter *CRS Study*] (quoting Defense Management Data Center procedures) (Administrative Record (A.R.) 878).

[2] *Census—Place of Residence: Hearing Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 94th Cong., 2d Sess. 7, 9 (1976) (statement of Robert L. Hagan, Deputy Director, Bureau of the Census) (reproduced at A.R. 41, 43) [hereinafter *1976 Hearing*].

tion and the substantial expense of allocation) had become "largely inapplicable," and that "it has become entirely feasible to make the proposed allocation to home States." *Ibid.* He also found it "reasonable to assume that many, if not most, persons of voting age living abroad vote in their home States and consider themselves to be represented in Congress by members from their home States." *Ibid.*

In the 1980 census, the Commerce Department again included military personnel abroad in the total population of the Nation. It did not, however, include those personnel in the tabulation of state populations for apportionment purposes, because of the smaller size of the overseas population, the practice prior to 1970 of not allocating overseas personnel among the States, and concerns that "[t]he data on 'home State' of those overseas are of an unknown reliability." *1976 Hearing* 7, 9 (A.R. 41, 43).

3. The Commerce Department likewise did not originally plan to include military personnel stationed abroad (and their dependents) in the state totals to be used for apportionment following the 1990 census. A.R. 511-512. By July 1989, however, there was strong bipartisan support in Congress for doing so, and numerous bills were introduced in the 100th and 101st Congresses to mandate that result. Stip. ¶¶ 33, 37. One such bill was H.R. 4720, 100th Cong., 2d Sess., which was introduced on June 1, 1988, by Chairman Dymally of the House Subcommittee on Census and Population. That bill specified that the place of residence for census purposes "shall be considered to be the individual's last place of general abode within the United States for a period of 6 consecutive months or longer." A.R. 361-364. The bill was reported by the House Committee (H.R. Rep. No. 953, 100th Cong., 2d Sess. (1988)), but the House voted not to suspend the rules to permit passage. Stip. ¶ 33. The floor debates show a broad consensus in favor of including overseas personnel in the apportionment counts; the debates in-

stead centered on the manner in which they would be allocated among the States. See 134 Cong. Rec. 25,798-25,804 (1988). Some Members expressed the view that the home State should be based on an individual's "home of record," rather than his last abode of six months, *id.* at 25,799-25,800 (Reps. Ridge and Goodling), noting that the latter test "would drastically skew the census toward those few States with a large number of military bases." *Id.* at 25,801 (Rep. Kennelly); see also *id.* at 25,803 (Rep. Green); *id.* at 25,803-25,804 (Rep. Petri).

4. On July 31, 1989, the Secretary of Commerce decided to count federal personnel abroad for apportionment purposes in 1990. A.R. 511-512. The Secretary noted that the Defense Department "believes strongly that its employees should not be excluded from apportionment counts because of temporary and involuntary residence overseas." A.R. 511. He also relied on the growing bipartisan concern of Congress; the Defense Department's assurance that it was feasible to provide the necessary counts of overseas military personnel and their dependents in time to meet the December 31, 1990, deadline for reporting to the President; the precedent of including overseas military personnel in 1970; and Assistant Attorney General Rehnquist's 1969 opinion that the Department enjoyed the discretion to do so. A.R. 511-512.

At the time the Secretary decided to include overseas personnel, the Commerce Department planned to use data derived from an enumeration to be conducted by the Defense Department. Due to a lack of funding and other constraints, however, the Defense Department abandoned that option in December 1989. Stip. ¶ 46; A.R. 787. Attention then turned to developing an alternative approach, based on existing Defense Department data. At that point, the Commerce Department chose to count military personnel based on their last address in the United States of at least six months' duration, although it expressed its willingness to utilize "home of record" data if the Defense Department reexamined available evi-

dence and furnished an acceptable methodology by October 31, 1990. A.R. 830-835.

In the meantime, congressional support for use of "home of record" data intensified. For example, in a letter dated April 5, 1990, four Members of Congress urged the Director of the Census Bureau to adopt the "home of record" method, rather than the individual's last residence in the United States (A.R. 811-812):

> Upon entering the service, each member of the armed services must indicate a "home of record." This home of record will remain constant throughout the enlistment period and reflects the state where the individual resided prior to enlistment. Upon discharge from service, the individual is granted a moving stipend to cover the expense of moving from the point of discharge back to the home of record.
>
> * * * The only administrative listing which would best describe the residence of our members of the armed forces stationed abroad is the home of record. After all, the state listed for the home of record is the last location at which the members of the armed forces *CHOSE* TO RESIDE. In a very real sense, those states had this population taken from them by federal action.

On May 23, 1990, two bills, H.R. 4903 and S. 2675, 101st Cong., 2d Sess., were introduced to require the Census Bureau to assign members of the military stationed abroad to home States using their "homes of record." The House Report on the former expressed the view that members of the Armed Forces and their dependents stationed overseas "are entitled to representation in Congress and should be included in the population figures used for apportionment of the House of Representatives," and it recommended counting them on the basis of their homes of record because that information "most closely approximates the home State of individuals who are highly mobile, not by choice, but by virtue of their service to their country." H.R. Rep. No. 552, 101st Cong., 2d

Sess. 2 (1990). The House passed H.R. 4903 under a suspension of the rules on June 26, 1990. 136 Cong. Rec. H4195-H4197 (daily ed.). The companion Senate bill was scheduled for consideration by the Senate committee in the near future. A.R. 862, 863, 919.

In light of these developments, the Commerce Department decided to revisit the question of the most appropriate method of allocating overseas military personnel among the States for apportionment purposes. The Census Bureau accordingly evaluated the three methods for which data were available in Defense Department records: legal residence, home of record, and last duty station in the United States. A.R. 921. After doing so, the Associate Director of the Bureau in charge of the Decennial Census reported that in view of all the currently available information, "the technical staff of the Census Bureau believes that the Home of Record comes closest to the concept of the Usual Residence among the three data sources that DoD has available." A.R. 924. The concept of "usual residence" has been the guiding principle in formulating enumeration and residence rules since the first census in 1790. As applied by the Commerce Department, it provides that persons should be included in the census counts at the place where they live and sleep most of the time as of the census date, although persons who are occasionally or temporarily absent are often counted at their homes. App. 59a, 60a-61a n.24, 80a-81a; Stip. ¶¶ 4, 5.

The Under Secretary agreed with the Census Bureau and recommended to the Secretary that the "home of record" method be adopted, A.R. 919, especially since the Defense Department had represented that its existing data (in which gaps had been identified) "would be supplemented and improved by methodologies devised by technical experts who designed the overseas enumeration." A.R. 920. As a result, he concluded, home of record data "will constitute the most accurate data available from the Department of Defense." A.R. 919.

The Under Secretary acknowledged that a recent letter from Assistant Secretary of Defense Jehn to Representative Aspin had stated that the last duty station in the United States most closely approximates the "usual residence" concept. But the Under Secretary explained that "because last duty station merely reflects the location of the facility to which a person is assigned, many military personnel and their dependents would be counted in states other than their actual previous U.S. residence (such as those assigned to the Pentagon, who would be counted as D.C. residents even though they lived in Maryland or Virginia)." A.R. 921. The Under Secretary also explained that the option of using legal residence was rejected because in many cases legal residence—which is declared by a member of the Armed Forces for tax purposes (*CRS Study* 4 (A.R. 878))—does not necessarily reflect a substantial nexus to the State. A.R. 921; see also A.R. 932 (a person may designate as his legal residence "a place where [he] was assigned at any point during military service, no matter how brief the assignment or how distant in time").[3]

[3] The Congressional Research Service had also studied the three available methods for allocating military personnel stationed abroad to particular States, and found that each has its advantages and disadvantages. See *CRS Study* 5 (A.R. 879). Thus, it concluded that the home of record "may well reflect the person's own concept of his or her home State," although he or she may not return to that State at the end of the term of service; legal residence "reflects the State to which the person chooses to pay his or her taxes, but a person may choose a low or no tax State to claim as a legal residence"; and although last duty station may reflect where the person last resided and thus be comparable to the Census Bureau's usual residence rule, it may not actually indicate the State where a person lives because it "may be in a different State than where he or she resides." *CRS Study* 5-6 (A.R. 879-880). The *CRS Study* also found that allocating military personnel among the States according to home of record is "closest to the population distribution of the entire population," whereas an allocation based on legal residence varies from the distribution of the entire population nearly three times as much as home of record and an allocation based on last duty station varies ten times as much. *CRS Study* 6 (A.R. 880).

The Under Secretary communicated the Department's reasoning in letters to a number of Members of Congress on July 23, August 7, and September 11, 1990. A.R. 925-942. He also noted that although approximately 7% of overseas personnel records lacked a home of record designation, the Defense Manpower Data Center planned to "use supplemental data from their automated records" to fill the gap and that, as a result, "the number of missing state designations will be negligible." *Ibid.*[4]

5. On May 1, 1991—almost four months after it received its certificate of entitlement to ten Representatives—the Commonwealth of Massachusetts and two of its registered voters filed this suit in an effort to retain Massachusetts' eleventh Representative. They challenged (1) the equal proportions method prescribed by 2 U.S.C. 2a for apportioning Representatives among the States (an issue that is already before this Court in *United States Dep't of Commerce* v. *Montana*, No. 91-860 (argued Mar. 4, 1992)), and (2) inclusion of federal personnel stationed abroad in the population totals used for apportioning Representatives among the States. Because appellees challenged the apportionment of Congress on constitutional grounds, a three-judge district court was convened under 28 U.S.C. 2284(a). App. 5a-14a.

a. The court rejected appellees' constitutional challenge to the equal proportions method for apportioning Representatives among the States. It therefore disagreed with the holding by the three-judge district court in the *Montana* case that the equal proportions method is unconstitutional. App. 27a-56a.

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[4] If the Defense Department did not have a home of record for a member, his home State (and that of his dependents) was determined on the basis of his legal residence, with last duty station being used if legal residence also was not available. Stip. ¶ 56. The home States of Defense Department civilian employees (and their dependents) were determined through responses to questionnaires. A.R. 944. The home States of overseas employees of other federal agencies (and their dependents) were based on the agencies' responses, drawn from data in their records, to a form provided by the Census Bureau. Stip. ¶ 57.

b. The district court also rejected appellees' contention that because Section 2 of the Fourteenth Amendment refers to the counting of persons "in each State," inclusion of federal personnel stationed abroad violates the Constitution. App. 79a-81a. The court explained that the notion that the apportionment may "only be based on a person's actual physical presence in a state on census day * * * finds no support in the case law," which instead interprets the "in each State" language to refer to actual inhabitants of the State—"that is, persons with some relation to the state," not "simply those physically in the state on census day." *Id.* at 80a. Thus, in *Bethel Park* (which rejected the contention that federal personnel stationed abroad had to be assigned to particular locations *within* a State following the 1970 census) the court found "no indication that the members of the Constitutional Convention had in mind any specific criteria by which persons were to be deemed residents of one state rather than another," and that "[i]t is most likely that [the Framers] thought in terms of an average inhabitant." App. 80a (quoting 319 F. Supp. 971, 974 (W.D. Pa. 1970)). As a result, the court below continued, "[a]llocation of what the *Bethel Park* court referred to as the 'fringe' populations has long been considered a discretionary decision open to revision as time unfolded and circumstances developed." App. 80a; see also *id.* at 81a (quoting 41 Op. Att'y Gen. 31, 33 (1949)).

The court pointed out that in addition to military personnel, other subclasses of persons (such as boarding school and college students, other Americans abroad, and crew members of vessels at sea) also present the problem of how to account for people who are away from what might be considered their domicile or legal residence on the census date. The court noted that "[c]ensus administrators have developed various methods for dealing with the[se] subclasses"—methods that "have reflected contemporary societal views about what location should be designated as the 'usual residence' for such a person and the administrative practicability and accuracy of making

a count of a member of the subclass at a particular location." App. 60a-61a n.24. In the court's view, this "flexibility of the 'usual residence' concept as applied by the Census Bureau over the years * * * demonstrates the broad discretion the Bureau has traditionally enjoyed to interpret what the phrase 'in each state' means." *Id.* at 81a.

c. The court likewise rejected appellees' contention that inclusion of federal personnel stationed abroad in state population totals violates the Census Act. App. 81a n.31. It noted that 13 U.S.C. 141(a) provides for the Secretary of Commerce to conduct the decennial census "in such form and content as he may determine." That language, it reasoned, "gives the Secretary broad discretion to determine how the census will be carried out, discretion which mirrors the broad mandate given to Congress" by Article I, Section 2, Clause 3 to provide for the enumeration "in such Manner as they shall by Law direct." App. 81a n.31. The court was unpersuaded by appellees' argument that although 13 U.S.C. 141(a) gives the Census Bureau discretion to determine *how* to conduct the census, it severely circumscribes the Bureau's discretion to determine *who* shall be counted for purposes of apportionment; in the court's view, "in determining how the census is to be carried out, the Bureau necessarily must determine who shall be counted, *i.e.*, the 'content' of the census." App. 81a n.31. The court therefore concluded that "[t]he policy decision to apportion overseas federal employees is well within the discretion afforded the Census Bureau under the Census Act." *Ibid.*

d. Despite its holding that inclusion of federal personnel abroad (and their dependents) violates neither the Constitution nor the Census Act, the district court nevertheless invalidated the Secretary's determination to do so for the 1990 census. Finding a violation of the APA, the court rejected appellants' position that the Secretary's determination to count overseas personnel on the basis of their homes of record and comparable data is not subject to judicial review under the APA because that matter is

"committed to agency discretion by law." 5 U.S.C. 701(a)(2). It recognized that 13 U.S.C. 141(a), by providing for the Secretary to conduct the census "in such form and content as he may determine," "is plainly drawn in discretionary terms" and "fairly exudes deference." App. 70a (quoting *Webster* v. *Doe*, 486 U.S. 592, 600 (1988)). But, observing that the census "can be profoundly influential in the balance of advantage among competing partisan and parochial interests," the court found it "especially appropriate to have some review by the courts, as the distinterested branch of government." App. 71a. The court believed that in this case, the "usual residency" policy that has been followed since 1790 furnished adequate standards for judicial review. *Id.* at 70a, 71a. The court also noted that other courts had reviewed census determinations under the APA's arbitrary and capricious standard. *Id.* at 68a-69a.

On the merits, the court condemned the Secretary's manner of including federal personnel abroad as arbitrary and capricious. App. 75a-79a. The court surmised that the Secretary decided in July 1989 to include overseas personnel only because the Defense Department planned to conduct a special enumeration that was expected to generate reliable data. The court stated that if the Secretary's decision-making were complete at that time, it "would not be prepared to say that his decision was arbitrary and capricious." *Id.* at 76a. But the court faulted the Census Bureau for proceeding to include personnel abroad after the Defense Department cancelled its plans for the enumeration. *Id.* at 76a-79a. The court attributed that course to "inertial forces" that did not permit consideration of reverting to the policy of not including personnel abroad in the state totals, despite what the court regarded as deficiencies in the home of record data and its belief that the administrative record did not dispel misgivings previously expressed by the Census Bureau and Defense Department about the home of record and other methods. *Id.* at 76a-77a.

Rather than remanding the matter to the Secretary for further proceedings, the court ordered the Executive Branch defendants, by March 31, 1992, to submit to the Clerk of the House of Representatives a statement showing the number of Representatives to which each State would be entitled as a result of the 1990 census under 2 U.S.C. 2a without inclusion of personnel abroad. The court further ordered the Clerk of the House of Representatives, by April 10, 1992, to send to the Governor of each State a recertification of the number of Representatives to which it is entitled under the district court's decision. App. 95a.[5] If allowed to stand, the district court's judgment will result in the loss of one Representative by the State of Washington and a gain of one by Massachusetts. Stip. ¶ 42.[6]

THE QUESTIONS ARE SUBSTANTIAL

The district court greatly exceeded its authority by ordering appellants to eliminate a total of 922,819 people from the 1990 census tabulation and to effect a reapportionment of the House of Representatives—even though the court held that inclusion of federal personnel stationed abroad in state population totals violates neither

[5] These requirements were conditioned upon the Massachusetts Legislature's enactment, by March 30, 1992, of a law redistricting the Commonwealth into eleven congressional districts, rather than the ten it was apportioned under the President's January 3, 1991, statement. App. 95a-96a. That condition has been satisfied: on March 13, 1992, the Commonwealth certified to the district court that the Governor had signed such a law. *Id.* at 91a.

[6] On March 5, 1992, appellants filed motions for reconsideration and for a stay pending reconsideration and appeal. The motion for reconsideration was accompanied by declarations by Charles D. Jones, the Associate Director of the Census Bureau for the Decennial Census, and Carl J. Dahlman, the Deputy Assistant Secretary of Defense for Requirements and Resources, which sought to explain the material in the record concerning the determination to count overseas personnel on the basis of their homes of record and comparable data. By order dated March 13, 1992, the district court denied the motions for reconsideration and a stay, and granted appellees' motion to strike the declarations. App. 85a-93a.

the Constitution nor the Census Act. That order constitutes an unprecedented intrusion into matters textually committed by the Constitution to Congress and, in turn, committed by Congress to the President, the Secretary of Commerce, and the Clerk of the House, without any provision or standards for judicial review and under strict deadlines and procedures that foreclose it. Judicial review of the conduct of the census under the APA therefore is barred both because "statutes preclude judicial review" and because "agency action is committed to agency discretion by law." 5 U.S.C. 701(a). Indeed, the President, whose statement to Congress determines the number of Representatives to which each State is entitled under 2 U.S.C. 2a, is not an "agency" whose actions are subject to judicial review under the APA.

Assuming arguendo that the conduct of the census is subject to judicial review under the APA, the district court plainly erred in holding that the Secretary of Commerce's method of including federal military and civilian personnel abroad in the enumeration was arbitrary and capricious. The "home of record" data on which the allocation of most military personnel was based represents the person's permanent or usual residence upon entering the service; the other bases the Secretary relied upon in the absence of "home of record" data are also reliable and sound. But even if we further assume, arguendo, that the district court correctly concluded that the Secretary had not adequately justified his method of including personnel abroad, the proper disposition was to vacate the Secretary's decision and remand for further proceedings. The court had no authority to order that federal personnel abroad be thrown out of the tabulation of state populations for 1990, much less to order the President to submit a new statement of apportionment to Congress.

The legal issues presented by this case are of paramount importance to the structure of the Government. The judgment below affects the number of Representatives to which Massachusetts and Washington will be en-

titled in Congress and the number of Presidential electors to which each will be entitled in the 1992 election. Accordingly, this case, like *Montana*, warrants review this Term, so that these and other States may confidently implement a final apportionment of their congressional districts. The Court therefore should promptly note probable jurisdiction and set the case for briefing and argument this Term.[7]

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[7] Under 28 U.S.C. 1253, "any party may appeal to the Supreme Court from an order granting or denying * * * [a] permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." A three-judge court was properly convened in this case pursuant to 28 U.S.C. 2284(a), which states that such a court "shall be convened * * * when an action is filed challenging the constitutionality of the apportionment of congressional districts." As we explain in our jurisdictional statement in the *Montana* case (91-860 J.S. 25-27), that statute applies to challenges to the apportionment of Representatives pursuant to 2 U.S.C. 2a. Appellees raised two constitutional challenges to the apportionment made by the President's January 3, 1991, statement to Congress pursuant to 2 U.S.C. 2a. One of those constitutional challenges was to the inclusion of federal military and civilian personnel stationed overseas. Because the district court enjoined that inclusion (albeit on APA grounds), a direct appeal from the judgment below may be taken to this Court. See, *e.g.*, *Alexander* v. *Fioto*, 430 U.S. 634, 636 (1977); *Engineers* v. *Chicago, R.I. & P.R.R.*, 382 U.S. 423, 428 (1966); *Zemel* v. *Rusk*, 381 U.S. 1, 5-6 (1965); see also *Dothard* v. *Rawlinson*, 433 U.S. 321, 324 n.5 (1977).

If the Court disagrees with our position on this Court's jurisdiction, the appeal from the district court's judgment lies in the First Circuit. Accordingly, out of an abundance of caution, we have also filed a protective notice of appeal to the First Circuit. And to ensure that the Court can enter a decision this Term, we shall also file a protective petition for a writ of certiorari before judgment to the First Circuit, pursuant to 28 U.S.C. 1254(1). As a result, if the Court should conclude at any stage that it does not have jurisdiction over this appeal, it may grant the certiorari petition in order to render a decision on the merits. See *Turner* v. *City of Memphis*, 369 U.S. 350, 353 (1962); *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 371 (1949). We took similar precautions in the *Montana* case. See 91-860 J.S. 28 n.22.

A. The district court erred in holding that inclusion of federal personnel abroad in state population totals based on "home of record" or comparable data is subject to judicial review under the APA.

1. The text of the Constitution commits the choice of the methods by which the census is conducted and Representatives are apportioned to the discretion of Congress. Article I, Section 2, Clause 3 requires that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers." Although the quoted language does not expressly so provide, it has always been understood to vest the power to apportion Representatives in Congress. *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842). In *Montana*, we argue that under the factors identified in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), Congress's exercise of that power is subject to judicial review only to determine whether it is plainly contrary to an explicit textual limitation. Accordingly, Congress's selection from among apportionment methods that are rationally tied to the "respective Numbers" of the States presents a political question not reviewable by the courts. 91-860 Gov't Br. 24-34; 91-860 Reply Br. 3-8.

The political question analysis set forth in our *Montana* briefs applies a fortiori here, especially since the district court held that the counting of personnel abroad violates no explicit constitutional limitation. Article I, Section 2, Clause 3 directs that the "actual Enumeration shall be made * * * in such Manner as they [the Congress] shall by Law direct." As a result, "responsibility for conducting the decennial census rests with Congress," *Baldrige* v. *Shapiro*, 455 U.S. 345, 347-348 (1982), and the quoted text contains no "judicially discoverable and manageable standards" for resolving a challenge to the manner Congress prescribes.

Moreover, with respect to the issue in this case, the selection of appropriate criteria for allocating overseas personnel among the States requires "an initial policy determination of a kind clearly for nonjudicial discre-

tion." *Baker* v. *Carr*, 369 U.S. at 217. In fact, the district court noted with approval that methods for counting various subclasses of people who are away from their domicile or legal residence on the census date "have reflected contemporary societal values" and the "administrative practicability and accuracy of making a count of a member of the subclass at a particular location" (App. 60a-61a n.24)—judgments of a distinctly "legislative" nature that are beyond the expertise of a court to make. For these reasons, if Congress itself had "direct[ed]" that the "actual Enumeration" of federal military personnel stationed overseas be made "in such Manner" as to include them in state populations based on their home of record, that legislative judgment would not be subject to review by the courts. An "independent resolution" of such an issue by a court would "express[] lack of the respect due [a] coordinate branch[] of government" on a matter so central to its political character as the data on which the allocation of its Members is based. *Baker* v. *Carr*, 369 U.S. at 217.[8]

[8] Here, as in *Montana*, the remaining *Baker* v. *Carr* factors further support the political question analysis. See 91-860 Gov't Br. 31-34; 91-860 Reply Br. 7 & n.5. Review by various courts of the census counts underlying the apportionment would interfere with the mechanism prescribed by Congress for apportioning Representatives among the States, and would, as a result, disrupt, confuse and delay apportionment of congressional districts within the States. See pages 23-24, *infra*. There accordingly is "an unusual need for unquestioning adherence to a political decision already made." 369 U.S. at 217.

In addition, as the judgments in this case and *Montana* vividly illustrate, litigation such as this creates a grave "potentiality of embarrassment from multifarious pronouncements by various departments on one question" (369 U.S. at 217): the judgment in *Montana* expressly *bars* the appellants in that case from effecting an apportionment under 2 U.S.C. 2a (91-860 J.S. App. 47a-48a), while the judgment in this case expressly *requires* a new apportionment pursuant to that statute (App. 95a). Still other suits have been brought to require the Secretary to adjust the census total to compensate for a disparate undercount in various States. See, *e.g.*, *Tucker* v. *United States Dep't of Commerce*, No. 91-2051 (7th Cir. Mar. 16, 1982), discussed below and at pages 21-22, *infra*. Accordingly, the proper forum for correction of any deficiencies in the conduct of the census is Congress, where all States are represented and a dispositive resolution may be promptly enacted, rather than in separate lawsuits in separate courts.

2. There is no basis for a different result here simply because the determination to include overseas federal personnel based on their homes of record or comparable data was made by the Secretary of Commerce, rather than by Congress itself. Congress has directed the Secretary to take the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a). As the district court itself correctly observed, this language "gives the Secretary broad discretion to determine how the census will be carried out, discretion which mirrors the broad mandate given to Congress" under Article I, Section 2, Clause 3. App. 81a n.31. Because Congress's exercise of its own power under the Census Clause of the Constitution is not subject to judicial review, the directly parallel

Nonetheless, the Seventh Circuit held in *Tucker* that a challenge to the Secretary's decision not to make a statistical adjustment of the census totals did not present a political question. It believed that a challenge to the accuracy of the census would not require the judiciary "to adjudicate questions that the Constitution has placed within the exclusive jurisdiction of another branch of government, or to disregard traditional limits on equitable relief." Slip op. 7-8. As we have explained in the text, however, the Constitution *does* grant Congress exclusive jurisdiction over the conduct of the census; and although Congress has assigned that responsibility to the Secretary, it has not assigned any role to the courts. The *Tucker* court also could not square application of the political question doctrine in cases involving challenges to the census with the rejection of that doctrine in apportionment cases such as *Baker* v. *Carr* and *Davis* v. *Bandemer*, 478 U.S. 109 (1986). Slip op. 7, 8. That observation ignores the critical point that the political question doctrine derives from the "the relationship between the judiciary and the coordinate Branches of the Federal Government" and is "essentially a function of the separation of powers." *Baker* v. *Carr*, 369 U.S. at 210, 217. *Baker* v. *Carr* and *Davis* v. *Bandemar* did not present those concerns, because they involved challenges to apportionments by state legislatures. By contrast, this case, like *Montana*, involves a challenge to action by the political Branches of the Federal Government.

language in 13 U.S.C. 141(a) strongly indicates that Congress likewise did not intend that the exercise of the power it delegated to the Secretary would be subject to review, or that the apportionment based on the census conducted by the Secretary could be set aside by a court. In fact, the Census Act and apportionment statute, especially when read together, foreclose APA review here.

a. In the first place, whether to use "home of record" data to allocate overseas personnel among the States is "committed to agency discretion by law." 5 U.S.C. 701(a)(2). Even when Congress has not expressly precluded judicial oversight, "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971) (action is committed to agency discretion by law where "statutes are drawn in such broad terms that in a given case there is no law to apply") (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). In this case, the applicable statute, 13 U.S.C. 141(a), contains no standards for determining on what basis the Secretary may include federal personnel stationed abroad in the tabulation of state populations. To the contrary, its language is at least as deferential as that at issue in *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988), under which the Court found that judicial review was unavailable under the APA's "agency discretion" exception.[9]

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[9] *Webster* involved a statute which, as the Court explained (486 U.S. at 600)

> allows termination of an Agency employee whenever the Director "shall *deem* such termination necessary or advisable in the interests of the United States" (emphasis added), not simply when the dismissal *is* necessary or advisable to those interests. This standard fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review.

Compare 13 U.S.C. 141(a) ("The Secretary shall * * * take a decennial census * * * in such form and content as he may determine.").

Although the district court agreed that 13 U.S.C. 141(a) "is plainly drawn in discretionary terms" and that—standing alone—it "fairly exudes deference," App. 70a (quoting *Webster* v. *Doe*, 486 U.S. at 600), it found that the statutory structure "has been refined further by the 'usual residence' policy that has governed census determinations since the First Census Act." App. 70a. The court failed, however, to appreciate the significance of the fact that while that policy was explicitly embodied in the First Census Act's reference to "usual abode" (Act of Mar. 1, 1790, ch. II, § 5, 1 Stat. 103), it is not mentioned in 13 U.S.C. 141(a). While the Census Bureau has pursued a "usual residence" policy over the years, the absence of any reference to it in the statutory text underscores that the articulation and application of the policy, and the nature of the factual basis on which it may be invoked in particular circumstances, are committed to the Census Bureau's discretion.

The numerous determinations of a technical and policy nature that must be made in planning for and compiling the results of an undertaking so massive as the enumeration of 250 million persons throughout the country and abroad further reinforce the conclusion that Congress committed that task—both in general and in its myriad particulars—to the sound judgment and discretion of the Secretary. Recognition of a right of judicial review under the APA would invite the courts to micromanage the census and invite States and individuals who believe they have been shortchanged to sift through the census plan and its implementation to find just the right "defect"—namely, one whose "correction" would work to their advantage. The rash of suits following the past three censuses underscores that potential.

In a similar case (and for similar reasons), the Seventh Circuit recently held that the Secretary's decision not to make a statistical adjustment of the census totals to compensate for an alleged undercount in certain States may not be challenged under the APA. *Tucker* v. *United*

States Dep't of Commerce, No. 91-2051 (Mar. 16, 1992). The court held that the Census Act does not confer litigable rights on persons claiming to be injured by the conduct of the census. Slip op. 9-15. Of particular relevance here, the court noted that 13 U.S.C. 141 and 2 U.S.C. 2a "say nothing about how to conduct a census or what to do about undercounts," but rather are so "nondirective" that "it is arguable that there is no law for a court to apply in a case such as this." Slip op. 12 (citing *Webster*, *Chaney*, and *Overton Park*). The district court in this case should have reached the same conclusion. Indeed, the Seventh Circuit in *Tucker* expressed doubt about the correctness of the decision in this case. See slip op. 13. *Tucker* therefore highlights the need for guidance from this Court.

b. Moreover, under the governing statutory scheme, it is action by the President, not the Secretary of Commerce, that determines the apportionment of Representatives. Under subsection (a) of 2 U.S.C. 2a, the President must transmit to Congress a statement showing the whole number of persons in each State and the number of Representatives to which it would be entitled under the method of equal proportions. 2 U.S.C. 2a(a). Subsection (b) then provides that "[e]ach State shall be entitled * * * to the number of Representatives shown in the statement required by subsection (a)"—*i.e.*, the *President's* statement.

As the D.C. Circuit held in *Armstrong* v. *Bush*, 924 F.2d 282 (1991), the President is not an "agency" within the meaning of the APA. The D.C. Circuit correctly reasoned that although 5 U.S.C. 701(b)(1) does not expressly exclude the President, the APA should not be read to apply to his actions, in view of the textual silence, the legislative history of the APA, the "longstanding practice" of the Executive Branch, and the "compelling reasons" for requiring a "clear statement" of congressional intent where a statute would implicate separation of powers concerns. 924 F.2d at 288-289; see also *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475 (1866). Accordingly, the APA, and the presumption of judicial review it sets forth (see 5 U.S.C. 702), do not support the core relief sought by appellees and granted by the district court—namely, an injunction requiring the President to submit a new apportionment statement to Congress pursuant to 2 U.S.C. 2a. See also pages 27-29, *infra*.

c. Other features of the census and apportionment statutes lead to the same conclusion. Those features bring this case squarely within the APA's exception for situations in which "statutes preclude judicial review." 5 U.S.C. 701(a)(1). First, the Census Act does not direct the Secretary of Commerce to publish the tabulation of state populations to the public at large, which would be expected if Congress had intended to permit the tabulation to be challenged in court by a member of the public (or the State in which he resides). Rather, the Act provides that the tabulation shall be "reported by the Secretary to the President of the United States." 13 U.S.C. 141(b). The fact that the Act contemplates further action by the President strongly implies that the Secretary's "report" is not a proper subject of judicial review under the APA. Cf. *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948).

Second, the time limits in the Census Act foreclose any opportunity for judicial review. The Secretary must submit his report to the President within nine months of the census date (*i.e.*, by December 31), and the President then must transmit his statement to Congress during the first week of the next Session of Congress, which typically commences on January 3. 2 U.S.C. 2a(a). Within fifteen days, the Clerk of the House then must send to the Governor of each State a certificate of the number of Representatives to which it is entitled. The whole point of this expedited schedule is to ensure that state legislatures are able to enact redistricting legislation immediately.[10] It is

[10] See 86 Cong. Rec. 4369, 4370, 4485-4486 (1940) (Rep. McLeod). Representative McLeod made the cited remarks in support of his floor amendment in 1940 (which was adopted by the House and

fundamentally incompatible with the certainty that Congress intended to assure for a court to review and set aside the apportionment made by the President's statement *after* the Clerk has informed the States of their entitlements. And the strict time limits preclude judicial review prior to that time. *Morris* v. *Gressette*, 432 U.S. 491, 500-504 (1977); see also *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 (1979); *Adams* v. *Nagle*, 303 U.S. 532 (1938); *American Bank, N.A.* v. *Clarke*, 933 F.2d 899 (10th Cir. 1991).

Third, the fact that the operative action by the President takes the form of a statement addressed to Congress suggests that any defects that may be perceived in that statement (or the census data on which it is based) are to be addressed *by* Congress, not by members of the public or the courts in suits brought against Executive Branch officers after the statement has been transmitted. That is clear from the text of 2 U.S.C. 2a(b), which provides that "[e]ach State *shall be entitled*, * * * until the taking effect of a reapportionment under this section *or subsequent statute*, to the number of Representatives shown in the President's statement" (emphasis added). By expressly reserving to itself the power to alter the apportionment in a "subsequent statute," Congress foreclosed the courts from setting aside the "entitlement" conferred on a State by the President's statement.[11] This

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Congress, Act of Apr. 25, 1940, ch. 152, § 2, 54 Stat. 162) to require the Clerk to send the certificates within 60 days of receipt of the President's statement, rather than at the end of the Session of Congress, as the Census Act of 1929 provided. Act of June 18, 1929, ch. 28, § 22, 46 Stat. 26-27. In 1941, the time period was compressed to fifteen days (Act of Nov. 15, 1941, ch. 470, § 2(b), 55 Stat. 762), thereby heightening the interest in expedition.

[11] Congress enacted such a provision in 1941, when it adopted the method of equal proportions in 2 U.S.C. 2a. By the time the 1941 Act was passed, the apportionment made pursuant to the President's statement had already become effective because of the passage of 60 days. Congress not only mandated use of the equal proportions method on a prospective basis (for the 1950 census apportionment and beyond); it also mandated its use "retroactively" to the 1940 census by requiring that new certificates to be sent—which benefited Arkansas at the expense of Michigan. See Act of Nov. 15, 1941, ch. 470, § 2(a), 55 Stat. 762; 2 U.S.C. 2a, 2b; 91-860 Gov't Reply Br. 13-14.

conclusion is reinforced by the nature and purpose of the actions the court below set aside, for technical and policy decisions that bear on apportionment of the House of Representatives clearly involve the sort of "sensitive and inherently discretionary judgment call[s]" in which courts ordinarily have no role. *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988); cf. *Coleman* v. *Miller*, 307 U.S. 433 (1939).

B. Even if the Secretary's determination to include federal personnel abroad in the enumeration and to allocate them to States based on their "homes of record" or comparable data is not altogether insulated from judicial review, that determination certainly was not arbitrary and capricious.

The district court specifically found that it is "well within the discretion afforded the Census Bureau under the Census Act" to assign overseas federal personnel to the States for apportionment purposes. App. 81a n.31. The only remaining question, then, concerned the Secretary's selection of an appropriate method for making that assignment. Where, as here, determinations must be made about the quality of available data and choices among possible alternatives, the Secretary's discretion is at its zenith. See *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989) (quoting *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976)) ("[b]ecause analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to the 'informed discretion of the responsible federal agencies'"). Even lower courts holding that judicial review of census determinations is not completely barred have uniformly acknowledged the "wide latitude" afforded the Census Bureau "to select its methods, techniques and by those

means to arrive at its own result." *Philadelphia* v. *Klutznick*, 503 F. Supp. 663, 677 (E.D. Pa. 1980).[12] Here, the Secretary and the Census Bureau acted well within the ambit of their discretion.

The district court was of the view that home of record data could "not provide a valid factual basis" for the apportionment of overseas employees. App. 77a. As the district court saw it, the Secretary's decision in July 1989 to incorporate overseas federal personnel in apportionment counts was based on the Defense Department's plans to conduct a census of its personnel abroad concurrently with the general decennial census; it correspondingly surmised that once the Defense Department withdrew its plans in December 1989, nothing but "inertial forces" drove appellants to use home of record data as a substitute for the Defense Department's cancelled survey. *Id.* at 75a-76a. Not so.

When the Defense Department dropped its plans to conduct a special enumeration, the Census Bureau considered alternative data sources that were available in existing records. After doing so, it concluded that home of record—which represents the State of the individual's permanent or actual residence at the time of enlistment—"comes closest to the concept of Usual Residence." A.R. 924. That judgment comported with the considered view of the House of Representatives, which passed a bill to mandate use of home of record data on the premise that "it most closely approximates the home State of individuals who are highly mobile, not by choice, but by virtue of their service to their country." H.R. Rep. No. 552, *supra*, at 3. By contrast, "[l]ast duty station merely reflects the location of the facility to which a person is as-

[12] See also *City of Camden* v. *Plotkin*, 466 F. Supp. 44, 53 (D.N.J. 1978) (the Census Bureau enjoys "broad discretion" in "determining the methods of enumeration"); accord *United States ex rel. City of Atlanta* v. *Steuart*, 47 F.2d 979, 982 (D.C. Cir. 1931); *Bethel Park*, 319 F. Supp. at 976; *Quon* v. *Stans*, 309 F. Supp. 604, 607 (N.D. Cal. 1970).

signed"—and to which he or she may retain no affinity after being transferred[13]—and would result in counting personnel in "states other than their actual previous U.S. residence." A.R. 925, 921.

The Census Bureau also satisfied itself that the data to be furnished by the Defense Department would be accurate, in light of the latter's representations that it would supplement its data and improve its methodologies. See page 10, *supra*. Moreover, although the district court made much of the Census Bureau's initial reliance on the Defense Department's proposed enumeration, which the court believed would have been preferable, that enumeration was designed to ascertain the person's last residence in the United States of six months or more in duration. A.R. 454, 497. Accordingly, like the "last duty station" method the Census Bureau rejected, it would not necessarily have resulted in an accurate measure of a person's permanent affinity for the State in question. But even if the district court might reasonably have concluded that the Defense Department's enumeration would have been "better" or "preferable" to the use of home of record data, that finding would not render the Census Bureau's approach arbitrary and capricious, or justify a court order mandating elimination of an entire component of the national population from the apportionment counts. Cf. *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U.S. 490, 527-528 (1981).

C. Even if the district court were correct in holding that the Secretary did not adequately explain his determination to include federal personnel stationed overseas in the state-by-state tabulation on the basis of their

[13] See A.R. 752 (remarks of Rep. Ridge during House subcommittee hearing on H.R. 2661, 101st Cong., 1st Sess. (1989), which would have required inclusion of overseas military personnel in apportionment counts) ("before I was shipped overseas I spent six months at Fort Benning, Georgia. I have not been since that time, at that time, or for the foreseeable future ever interested in being considered in any census as a resident of Fort Benning, Georgia. Northwestern Pennsylvania is my home.")

homes of record or comparable data, the relief ordered by the district court was wholly improper. As this Court recently explained, the options of a reviewing court in such circumstances are narrowly confined:

> If the record before the agency does not support the agency action, if the agency has not considered all the relevant factors, or if the reviewing court simply cannot evaluate the challenged action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Florida Power & Light Co. v. *Lorion*, 470 U.S. 729, 744 (1985); accord *PBGC* v. *LTV Corp.*, 110 S. Ct. 2668, 2680 (1990); *Camp* v. *Pitts*, 411 U.S. 138, 142-143 (1973); *Overton Park*, 401 U.S. at 420. Adherence to that principle is especially necessary in the present context, because Congress has expressly conferred broad discretion and responsibility on the Secretary of Commerce to conduct the census, which necessarily includes authority to reevaluate data and methodologies when possible defects are brought to her attention. The district court improperly usurped that function by foreclosing any further consideration of including more than 922,000 persons in the apportionment counts.

Furthermore, even if the court could, under ordinary APA principles, order the *Secretary* to delete overseas federal personnel and their dependents from the apportionment counts, it had no authority to enter an injunction requiring the *President* to effect a new apportionment of the House of Representatives by transmitting a statement to Congress pursuant to 2 U.S.C. 2a. As we have explained, the President is not even subject to suit under the APA. In any event, the APA does not override established principles governing the denial of equitable relief. 5 U.S.C. 702. Here, the injunction results in an extraordinary intrusion into matters committed by the Constitution and laws to the political Branches; it also effects an extraordinary disruption of the redistricting process in the States that the expedited schedule in 2 U.S.C. 2a was designed to facilitate. The judgment of the district court therefore warrants review by this Court.

CONCLUSION

The Court should note probable jurisdiction and reverse the judgment of the district court.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

MICHAEL JAY SINGER
MARK B. STERN
LORI M. BERANEK
Attorneys

MARCH 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45370